No. 94-1450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL LAWSON and DAVID CRIST,

Petitioners,

—v.—

ELRICK MURRAY and BELINDA MURRAY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On Sunday, January 20, 1991, Petitioner Lawson and approximately 56 other demonstrators picketed in front of the suburban residence of Respondents, Dr. Elrick Murray and his wife Belinda Murray, in Westfield, New Jersey, to protest Dr. Murray's performance of abortions. Dr. Murray neither maintains an office nor performs abortions at his home. Petitioners' Appendix (PA) at 67a.

Dr. Murray did not, as Petitioners describe, spend a relaxing Sunday at home. He, in fact, remained at home on the advice of the Westfield police and, also on their advice, sent his wife and children, ages 6, 11 and 15, to stay with relatives. Fearful of leaving the house, he was forced to manage patients in labor over the telephone. Subsequent to the picketing, Mrs. Murray became anxious and depressed; Dr. Murray curtailed many of his professional obligations for fear of leaving his home unattended. PA at 68a.

Respondents filed suit seeking a temporary restraining order and a permanent injunction. A temporary restraining order was entered by the Superior Court of New Jersey, Chancery Division, on February 22, 1991, permitting picketing for one hour every third week by no more than two demonstrators.[1] On July 26, 1991, the court issued a permanent injunction prohibiting Petitioners from coming within 300 feet of the Murray residence.

Both the New Jersey Superior Court, Appellate Division, and the Supreme Court of New Jersey affirmed the permanent injunction. After this Court decided the case of *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994), Petitioners petitioned this Court for certiorari. This Court

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[1] Evidentiary hearings were held on February 14, 1991 for the temporary restraining order and on May 21 and 31, and July 25, 1991 for the permanent injunction. PA at 67a.

granted the petition, vacated the judgment below, and remanded for further consideration in light of *Madsen*. *Lawson v. Murray*, 115 S. Ct. 44 (1994).

On remand, the New Jersey Supreme Court reconsidered its decision in light of the new standard announced in *Madsen* for the constitutionality of content-neutral injunctions: whether they burden "no more speech than necessary to serve a significant government interest." 114 S. Ct. at 2525. The court concluded that the 300 foot zone did burden more speech than necessary to serve the significant government interest in protecting residential privacy, and revised the injunction in light of the new standard.

In determining the boundaries of appropriate injunctive relief, the New Jersey Supreme Court relied on the trial court's well-developed record, which included a videotape of the demonstrations, photographs, personal examination by the trial judge of the Murrays' street and neighborhood, the tax map of the town of Westfield and testimony of witnesses. PA at 26a-30a.

The court first determined that, based on this record, some form of bright line, no-picketing buffer zone was necessary to protect the Murrays' privacy. The court noted that although the original picket line spanned a route of approximately ten houses, at no time was the Murray home free from picketers. Injunctive relief was necessary, therefore, to protect the Murrays from being "under siege" in their residence. The court viewed a "bright line" no-picketing zone, as compared to Petitioners' and amici's suggestion of a long line of marchers large distances apart, as preferable from the standpoint of police enforcement. PA at 33a-34a.

The court then considered the trial court's factual findings concerning the physical layout of the Murrays' neighborhood and the homes on their block. It noted that the 300 foot buffer zone placed the demonstrators out of sight of the Murrays, even from their yard, making it difficult for the

demonstrators to communicate their message. It therefore narrowed the buffer zone to 100 feet from the boundary of the Murray property, a mere lot and a half away. Under this arrangement, the Murrays' residential privacy is protected because they can not hear or see the demonstrators from inside their house, but the demonstrators' speech is made more effective because the Murrays can see the demonstrators from their yard, if they choose to leave the house and receive the message. PA at 35a-36a. The Murrays are therefore given a zone of refuge, but that zone is no wider than necessary to protect their privacy.

The New Jersey Supreme Court further limited the number of pickets to ten, so that the Murrays will not feel "under siege" but the picketers will not be so few as to appear to represent only a marginal viewpoint. It limited picketing to one hour every two weeks so that Petitioners can demonstrate often enough and long enough to get their message across without subjecting the Murrays to a constant barrage of picketing.[2] Finally, the injunction requires Petitioners to notify the Westfield police twenty-four hours in advance of any picketing. *Id.*

Objecting to even these modest restrictions, Petitioners once again seek review of the New Jersey Supreme Court's decision.

REASONS FOR DENYING THE WRIT

Contrary to Petitioners' assertions, the New Jersey Supreme Court's decision does not conflict with decisions of lower federal courts or of this Court. The decision below faithfully applies this Court's decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 to facts set forth in a

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[2]Petitioners apparently do not object to the limits on frequency and duration of picketing.

comprehensive record developed by the trial court. It carefully adjusted the free speech rights of Petitioners, and the state's and Respondents' interests in residential privacy, so as to "burden no more speech than necessary" to protect those interests. The writ, therefore, should be denied.

I. THE DECISION OF THE NEW JERSEY SUPREME COURT DOES NOT CONFLICT WITH A DECISION OF THE SIXTH CIRCUIT.

Petitioners claim that the decision of the New Jersey Supreme Court and of the Court of Appeals for the Sixth Circuit in *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir. 1995) are in "glaring conflict." Petitioners' Brief (Pet. Brf.) at 8. This is not the case.

In *Vittitow*, anti-abortion picketers filed suit claiming a town ordinance that prohibited picketing "before or about" any residence was unconstitutional. The trial court issued an injunction that attempted to narrow the scope of the ordinance to the area in front of a targeted residence or "the two homes on either side" of the targeted residence. The Sixth Circuit stated that the narrowing injunction was unconstitutional because it created a no-picketing zone beyond the area "solely in front of a particular residence." 43 F.3d at 1105 (citing *Madsen*, 114 S. Ct. at 2530). Petitioners claim this holding conflicts with the decision of the New Jersey Supreme Court creating a no-picketing buffer zone of 100 feet on either side of the Murrays' residence.

The *Vittitow* injunction, however, interprets a statute of general applicability, unlike the injunction in this case, which adjusts the rights of private parties based on the facts of an individual case. As the Sixth Circuit said,

> This is not a case where the target of the picketing has come to court seeking an injunction. In such a case, the trial judge rightfully undertakes to define the rights of the parties in an appropriately worded injunction, if an injunction is called for. Here, however, an ordinance was at issue.

43 F.3d at 1107. An injunction interpreting an ordinance to place demonstrators two houses away from their target throughout an entire town will have varying effects on speech depending on the neighborhood where the picketing is taking place. Such an injunction may well therefore burden more speech than necessary to serve the interests of residential privacy. It is such a "one-size-fits-all" injunction that the Sixth Circuit held to be beyond the scope of this Court's decisions in *Frisby v. Schultz*, 487 U. S. 474 (1988), and in *Madsen*. *Vittitow*, 43 F.3d at 1107.

In contrast, in this case "the target of the picketing has come to court seeking an injunction" and the court has "define[d] the rights of the parties in an appropriately worded injunction." 43 F.3d at 1107. That injunction, pursuant to the dictates of *Madsen*, has been crafted to burden no more speech than necessary, in light of the facts of the case, to serve the state's interest in residential privacy.[3]

The decisions of the Sixth Circuit in *Vittitow* and of the New Jersey Supreme Court in this case are not in conflict.

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[3] If *Vittitow* does interpret *Madsen* to forbid no-picketing zones larger than the frontage of a residence when private parties seek relief in a particular case, *Vittitow* is wrong. This Court in *Madsen* struck an injunction providing a 300 foot no-picketing zone because it was "much larger" than the zone provided for in the ordinance approved in *Frisby* and it appeared that a smaller zone could have accomplished the desired result. 114 S. Ct. at 2530. *Madsen* did not establish how large the smaller zone should be, leaving that task to trial judges to determine, based on the facts of the individual case, keeping in mind the new standard that the injunction should burden no more speech than necessary to serve the state's significant interests.

II. PEACEFUL PICKETING IN RESIDENTIAL NEIGHBORHOODS MAY BE SUBJECTED TO TIME, PLACE AND MANNER RESTRICTIONS THAT BURDEN NO MORE SPEECH THAN NECESSARY TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST.

Petitioners argue that peaceful picketing cannot be regulated by an injunction without some accompanying wrongful conduct. Although Petitioners state that such injunctions "fl[y] in the face of long-settled constitutional doctrine," Pet. Brf. at 10, they do not cite a single case for this proposition. On the contrary, this proposition flies in the face of this Court's decisions in *Madsen* and *Frisby*.

In *Frisby* this Court held that peaceful picketing may not be banned, but may be subject to time, place and manner restrictions that are narrowly tailored to serve significant government interests. In that case this Court upheld an ordinance that banned picketing "before or about" a single residence.

Petitioners here do not challenge the authority of *Frisby* and point to no reason why a state court sitting in equity[4] may not impose constitutional time, place and manner restrictions on similar picketing when a private party applies for relief. The only relevant constitutional question is whether Petitioners' speech has been burdened more than necessary to achieve a significant state interest. *Madsen*, 114 S. Ct. at 2525.

Indeed, *Madsen* approved the issuance of an injunction without any finding of prior unlawful conduct. In that case, this Court reviewed an injunction that banned residential picketing

[4]Whether the New Jersey courts of equity have authority to issue such injunctions in the absence of a statute is a matter of state law. Petitioners acknowledge as much. Pet. Brf. at 9 n.4.

within 300 feet of the residences of staff of a Florida health center that provided abortions. While this Court struck the ban as burdening more speech than necessary to achieve the government's significant interest in residential privacy, the Court counseled that "it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." 114 S. Ct at 2530. This Court did not require that in order for the injunction to be valid, the demonstrators must have done something illegal, and the trial court in *Madsen* did not find that, as to the residential picketing, any such unlawful acts had occurred.

Requiring some unlawful conduct to justify an injunction makes no sense in light of this Court's recognition in *Frisby* that targeted residential picketing "*inherently and offensively* intrudes on residential privacy." 487 U.S. at 486 (emphasis added). Petitioners are correct that their peaceful picketing is not "wrongful" and that it is protected by the First Amendment. They ignore the fact, however, that it does intrude on other important governmental and private interests and is therefore subject to regulation, consistent with constitutional standards.

III. THE INJUNCTION AT ISSUE IN THIS CASE IS NOT A PRIOR RESTRAINT.

Petitioners argue that the injunction at issue here is unconstitutional as a "prior restraint." This Court's decision in *Madsen*, however, categorically rejected this argument.

In reviewing the propriety of an injunction creating a 36-foot no-picketing "buffer zone" around a Florida abortion clinic, this Court said the injunction was not a prior restraint for two reasons, both of which apply here. First, unlike valid time, place and manner regulations, prior restraints absolutely ban a message in advance of publication. In contrast, the "petitioners [in *Madsen*] are not prevented from expressing their message in any one of several different ways; they are simply prohibited

from expressing it within the 36-foot buffer zone." *Madsen*, 114 S. Ct. at 2524 n.2. Similarly, here Petitioners are simply prohibited from expressing their message within the 100 foot no-picketing zone that surrounds Respondents' residence. Outside that zone, they are free to display any message they please. Moreover, under the terms of the New Jersey court's modified injunction, that message is in full sight of all who care to view it, even the Murrays, should they step outside their home.

Second, this Court said in *Madsen* that "the injunction was issued not because of the content of petitioners' expression . . . but because of their prior unlawful conduct." *Id.* The same analysis applies here. The New Jersey Chancery Court issued the injunction, not to quash Respondents' message, but to prevent a method of expression that this Court has acknowledged "inherently and offensively" intrudes on residential privacy. *Frisby*, 487 U.S. at 486.

Petitioners misconstrue this last statement from *Madsen* to mean that a finding of prior unlawful conduct is a precondition to a finding that an injunction aimed at picketing is not a prior restraint. The New Jersey Supreme Court correctly rejected this argument. PA at 21a. The correct constitutional inquiry, as stated in *Madsen*, is whether the restraint can be justified other than by reference to the content of the message. Nothing in *Madsen* or any other case suggests that prevention of unlawful conduct is the only non-content-based rationale that takes an injunction out of the category of prior restraints. Indeed, in *Madsen* this Court did not find the trial court's injunction a prior restraint, despite the fact that no crime or tort had been committed by the demonstrators in relation to that activity.[5]

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[5]Petitioners say that this Court has found prior restraints when an injunction did not restrict content. Prior restraints, however, may restrict content or they may restrict a class of speech *because of* its content. That is so in two of the cases petitioners cite. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (striking injunction that banned all leafletting because the leaflets contained material critical of a realtor who engaged in racially discriminatory practices); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) (finding a prior restraint in an injunction that banned all rallies of white separatist group because of content of speech at previous rallies). In a third case, the Court struck a statute that authorized injunctions based directly on the content of publications. *Near v. Minnesota*, 283 U.S. 697 (1931) (striking statute authorizing injunctions of malicious, scandalous or libelous publications). As stated above, the injunction here neither bans a message nor is imposed because of the message conveyed.

Petitioners further state that the requirement that they notify the police twenty-four hours in advance of a demonstration violates the First Amendment. This argument ignores this Court's holdings that even requirements for parade permits are permissible when the official's decisions on whether to grant or deny the permit are based on "narrow and definite" criteria that do not allow discriminatory administration because the official disagrees with the content of the speech. *Cox v. New Hampshire*, 312 U.S. 569 (1941). Such a permit system "giv[es] . . . public authorities notice in advance so as to afford opportunity for proper policing." *Id.* at 576. Here, of course, only notice is required; the police have no authority to prevent Petitioners from picketing.[6]

Petitioners also complain that limiting the number of picketers to ten is arbitrary and in violation of the First Amendment. On the contrary, the New Jersey Supreme Court was careful to allow Petitioners a strong enough showing, consistent with the residential nature of the neighborhood and the Murrays' privacy, that their message would not seem marginalized. Petitioners have pointed to no authority for the proposition that limiting pickets to ten in a specific, suburban residential setting is excessively restrictive. In contrast, all the cases cited by Petitioners involve statutes or ordinances of general applicability to a wide geographic area. *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 558-61 (5th

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[6]Ironically, Petitioners have voluntarily notified the police prior to their demonstrations even before the New Jersey Supreme Court's ruling. PA at 90a-91a.

Cir. 1988)(striking as unconstitutionally overbroad Texas statute prohibiting picketing by more than two persons 50 feet apart); *Davis v. Francois*, 395 F.2d 730 (5th Cir. 1968) (striking ordinance that allowed only two pickets at a time at any location in a city); *Davis v. Village of Newburgh Heights*, 642 F. Supp. 413, 415 (N.D. Ohio 1986) (ordinance limiting pickets to no more than six at any location in a city is unconstitutional. "[N]umber of pickets should be decided on a case-by-case basis.")

The doctrine of prior restraints is inapplicable here.

IV. THE INJUNCTION AT ISSUE IN THIS CASE IS NOT CONTENT-BASED.

Petitioners argue that the New Jersey Supreme Court erred in not applying the strict standards applicable to a "content-based" restriction on speech in a public forum. This Court rejected this argument in *Madsen* as well.

The fact that an injunction covers only people with a certain viewpoint does not render it content- or viewpoint-based. *Madsen*, 114 S. Ct. at 2524. As with prior restraints, the principal inquiry in determining content neutrality is whether the governmental regulation is adopted "without reference to the content of the regulated speech." *Id.* at 2523 (citing *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989)). In *Madsen*, the injunctive order was adopted without reference to content because it was adopted to cure abuses of a previous order aimed at protecting access to an abortion clinic. Only those with an anti-abortion view were covered by the injunction because only persons with those views had engaged in those demonstrations. Similarly, here the injunctions were entered to protect residential privacy, not to silence Petitioners' speech. Only Petitioners were covered because they were the only picketers. PA 21a.

Petitioners claim the injunctions are nevertheless

constitutionally suspect as content-based because they are justified by the intimidating effect of the picketing on the Murrays. While it is true that "intimidating effects" of the content of speech may not justify injunctive relief, intimidating effects of a form of speech may justify valid time, place and manner regulations to alleviate those effects. This Court in *Frisby* recognized that the intimidating effect of focused residential picketing may constitutionally justify a regulation of that activity and contrasted such permissible regulations to those based on the intimidating effect of the content of speech.

> [A]s opposed to regulations of communications due to the ideas expressed, which 'strikes at the core of First Amendment values,' regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment.

487 U.S. at 487, quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 83-84 (1983) (Stevens, J., concurring in the judgment). Compare cases cited by Petitioners, *Boos v. Barry*, 485 U.S. 312 (1988) (ordinance that banned speech "critical of foreign governments" cannot be justified with reference to the intimidating effect of such speech on foreign diplomats); *Madsen*, 114 S. Ct. at 2529 (holding that ban on display of "images observable" inside clinic cannot be justified by disagreeable nature of images).

The injunction at issue here is therefore not content-based.

V. THE COURT BELOW DID NOT BASE THE INJUNCTION AT ISSUE HERE ON VAGUE OR INDEFINITE STANDARDS.

Petitioners argue that because the court[7] below said an injunction can be based on the "intimidating effect" of residential picketing, it allowed restrictions on speech to be based on an "inherently subjective" standard. Pet. Brf. at 23. This argument again completely ignores this Court's decisions in *Frisby* and *Madsen*. *Frisby* recognized focussed residential picketing as inherently offensive and intimidating. *Madsen* affirmed this conclusion. 114 S.Ct. at 2529-30. Hence, when focussed residential picketing takes place, it may be regulated in a manner that burdens no more speech than necessary to serve the government interest in abating these effects. The intimidating "effect" of such activity is settled and, therefore, not open to subjective interpretation.

VI. COURTS MAY CREATE REASONABLE "PICKET-FREE" ZONES IN RESIDENTIAL NEIGHBORHOODS.

Petitioners argue that the courts may not create picket-free zones in residential neighborhoods. This argument is plainly contradicted by this Court's holding in *Madsen*. In that case this Court ruled that while the record before it did not justify a 300 foot picket-free zone around the homes of staff members of a Florida health clinic, "it appear[ed] that a limitation on the time, duration of picketing, and number of pickets *outside a smaller zone* could have accomplished the desired result." *Madsen*, 114 S. Ct. at 2530 (emphasis added). This Court plainly contemplates small picket-free zones as permissible means of serving the state interest in residential privacy. The New Jersey Supreme Court did not err in creating such a zone.

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[7]Petitioners refer to the decisions of the Appellate Division and the New Jersey Supreme Court in this portion of their argument. (Pet. Brf. Point IV.B.) The only relevant decision here is that of the New Jersey Supreme Court.

Additionally, Petitioners argue that even if such a zone is permissible, it is limited to the frontage of the targeted property because "Respondents' privacy interests are limited to the borders of their own property." Pet. Brf. at 28. Nothing in *Frisby* or *Madsen* supports the proposition that privacy interests coincide with property lines. The privacy interest is in not being held captive inside one's own home by a lurking presence outside the door. *Frisby*, 487 U.S. at 484-87. Depending on the facts of the individual case, that intimidating effect can be felt if demonstrators are next door, as well as if they are directly in front of the door. This is the case on the Murrays' street where the width of the residential lots is modest.[8] The New Jersey Supreme Court specifically found that the 100 foot buffer zone was necessary to allow the Murrays to isolate themselves from the demonstrators while they are inside the house. *See also City of San Jose v. Superior Court of Santa Clara County*, 38 Cal.Rptr.2d 205, 212 (Ca. Ct. App., Sixth District 1995) (post-*Madsen* case approving legislative judgment that "[p]icketers assembled at or near to the borders of a home create virtually the same invasion of residential privacy for its occupants and instill identical feelings of captivity, fear and intimidation . . . as do picketers directly in front of the residence").

Petitioners also argue that Respondents' privacy interests "are not a valid excuse for restricting their neighbors' access to the marketplace of ideas." Pet. Brf. at 28. This is a gross exaggeration of the effect of the injunction. Respondents may parade in plain sight of every resident of the Murrays' block;[9] their ideas are accessible to all. The injunction's only effect is to allow the Murrays to retreat inside their home in order not to see them and not to feel like "prisoners within their own home." PA at 35a.

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[8]The lots on the Murrays' block are 65 to 70 feet wide. PA at 28a.

[9]The block is 1800 feet long. PA at 30a. Counting the frontage of the Murray property and the 100 feet on either side, Petitioners are barred from picketing on at most 270 feet of that length.

CONCLUSION

The New Jersey Supreme Court faithfully applied this Court's precedents to craft an injunction that burdens no more speech than necessary to serve the state's significant interest in protecting residential privacy. The petition for certiorari should be denied.

Dated: April 3, 1995

Respectfully submitted,

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